

**STATEMENT OF**

**JOHN H. BANZHAF, III**  
**PROFESSOR, GEORGE WASHINGTON UNIVERSITY**  
**LAW SCHOOL**

**BEFORE THE**

**U.S. HOUSE JUDICIARY COMMITTEE**  
**SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW**

**LEGISLATIVE HEARING ON**  
**H.R. 339, THE “PERSONAL RESPONSIBILITY IN FOOD CONSUMPTION ACT”**

**PRESENTED ON**

**THURSDAY, JUNE 19, 2003**

In 2001 the U.S. Surgeon General issued a report showing that the U.S. was suffering from an epidemic of obesity which annually killed about 300,000 Americans and cost us over \$100 billion a year.<sup>1</sup> Since that time Congress has done virtually nothing of consequence to deal with this problem, just as for many years it did nothing of consequence to address the problem of smoking.

However, since I first proposed that legal action could be a powerful weapon against the public health problem of obesity, just as I had suggested - and then helped prove - that it could be a powerful weapon against the problem of smoking, the mere threat of legal action has proven to be very effective. For example, numerous articles and reports have noted that the threats of law suits have already prompted many food companies to take steps likely to reduce obesity.<sup>2</sup>

Yet some Members, not content to simply shirk Congress' responsibility to do something meaningful and effective about America's second most important and expensive preventable health problem, now support an industry-sponsored<sup>3</sup> bailout and protection bill to end what seems to be one of the few effective tools against this problem. FOR SHAME! If it ain't broke, don't fix it, especially until Congress is prepared to adopt comprehensive legislation to help save taxpayers more than \$50 BILLION annually in obesity costs.<sup>4</sup>

This bill is based upon two faulty assumptions. The FIRST is that the problem is caused by a lack of personal responsibility. But virtually everyone agrees that this epidemic rise in

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<sup>1</sup>See, [http://www.surgeongeneral.gov/news/pressreleases/pr\\_obesity.htm](http://www.surgeongeneral.gov/news/pressreleases/pr_obesity.htm)

<sup>2</sup> See generally, <http://banzhaf.net/obesitylinks> See also page 6 infra.

<sup>3</sup> "The **National Restaurant Association** is leading the effort to build support for this bill [H.R. 339] on Capitol Hill. See if your lawmaker is a cosponsor of H.R. 339 and take action to encourage them to sign on if they haven't already." See: [http://www.restaurant.org/government/issues/lawsuits\\_food.cfm](http://www.restaurant.org/government/issues/lawsuits_food.cfm)

<sup>4</sup> Fast food companies are responsible for more than 65% of the rise in American obesity, and for more than \$50 billion of the annual health care costs obesity imposes on taxpayers, according to a new study for the National Bureau of Economic Statistics. As the New York Times reported: "In analyzing the relationship of weight to incomes, food prices, restaurants, workforce participation and other variables, the economists concluded that the growth of fast food accounted for 68 percent of the rise in American obesity." **Belt-Loosening in the Work Force**, *New York Times* [3/2/03].

obesity and in obesity-related diseases<sup>5</sup> occurred largely within the past 15-20 years, and there is no evidence that there has been a corresponding drop in personal and/or parental responsibility.<sup>6</sup>

The SECOND faulty assumption is that, contrary to virtually every serious study, the fast food industry - with its misleading advertising,<sup>7</sup> failure to clearly and conspicuously disclose nutritional information (as all other foods do)<sup>8</sup> and/or to provide any warnings of the type common

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<sup>5</sup> Although some have tried to argue that the huge increase in obesity was caused merely by a change in the definition of "obesity," there has also been a corresponding very large increase in obesity-related diseases such as Type 2 Diabetes - a fact-based phenomena which obviously was not caused by a mere change in definitions.

<sup>6</sup> If there were some kind of precipitous decline in personal responsibility (or in parental responsibility) during the past 15-20 years, one would also expect to see it manifested in a huge increase in other risky personal behaviors such as the use of illicit drugs, the failure to use seat belts, boating and rafting accidents, accidental gun shot injuries, drunk driving accidents, etc. But this has not occurred. Thus one is asked to believe that this relatively-recent epidemic of obesity was caused by a dramatic decline in personal and/or parental responsibility for which there is no evidence, and which does not appear to manifest itself with regard to other risky personal choice behaviors.

<sup>7</sup> See, e.g., Judge Sweet's initial opinion in **Pelman v. McDonald's**: <http://banzhaf.net/docs/sweet1>

<sup>8</sup> The fast food industry lobbied vigorously and successfully to be virtually excluded from the statute which requires all foods sold in stores to provide prospective consumers with nutritional information, including the amount of calories, fat, and saturated fat. Thus, as Judge Sweet himself pointed out, potential consumers may well be deceived into believing that chicken dishes have less fat than beef entrees, and many customers are totally unaware of the large amounts of fat which are increasingly being found in dishes which purport to be "healthful." [see Ibid.]

As the business-oriented *Wall Street Journal* recently noted in **"That Veggie Wrap You Just Chowed Down Is More Fattening Than a Ham Sandwich"** [1/14/03]: "HERE'S A FAST-FOOD nutrition quiz. Which has the fewest calories: a McDonald's Quarter Pounder with Cheese, Panera's Smoked Ham and Swiss sandwich, or Baja Fresh's grilled chicken salad? Surprisingly, it's a Quarter Pounder. The answer is likely to shock diners who are flocking to trendy new eateries such as Fresh City, Baja Fresh Mexican Grill and Panera Bread, all of which promise fresh, nonfried and healthy- sounding fare. . . . the truth is that these and other wraps, salads and sandwiches being hyped as a healthy alternative to fast food are loaded with calories and fat. . . . While the restaurant chains don't make any specific claims about the healthfulness or calorie content of their menu items, they nonetheless give consumers the impression that they are offering healthier food. . . . **But consumers are being fooled.** . . . But making the healthy choice can be tough. Most restaurants don't display nutrition information inside the restaurant, and the menu offerings often are deceptive.. . . Nutritionists argue that calorie information should be available at the ordering

to many other products which present risks which are less serious but even better known<sup>9</sup> - is such an insignificant cause of obesity in all cases (including those regarding children)<sup>10</sup> that it deserves unprecedented absolute immunity from all liability.<sup>11</sup>

Neither proposition can be seriously advanced, much less proven, and the public

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counter. [emphasis added].”

<sup>9</sup> Courts have held that step ladder manufacturers can be held liable not only for failing to provide warnings about falling off the top step - a danger even clearer and more clearly common knowledge than the danger of eating too much fattening food - but even for failing to provide adequate warnings. Similarly, failure to warn about the danger of electrocution from reaching into the back of the television set, or using an electric hair dryer around ground pipes, or of infants eating lead-based paint, have all been held to create potential liability.

Warnings, after all, are not designed only for the best and brightest, but also for those with less education; less wisdom, judgment or maturity; and those who may be momentarily forgetful.

<sup>10</sup> It is impossible to argue that young children should be held fully responsible for their own lack of judgment or immaturity. Even the simplest contracts they enter into are void or voidable, and girls under the age of consent (often 18) cannot validly consent to engage in sexual intercourse because we conclusively presume that they cannot understand the consequences of their acts. Yet it appears that most girls of 17 understand the consequences of having sex far better than they understand the consequences of eating out often at fast food restaurants.

For those who then argue that food companies should escape all liability because children's obesity is caused solely by a lack of parental responsibility, the simple answer is that the law does not blame children for the lack of care of their parents, so long as the harm was reasonably foreseeable by the defendant. For example, when McDonald's gives out tiny action figures with its children's meals, it is very careful to warn in big letters of the choking danger present if the toys are given to infants - even though that danger is clearly common knowledge. McDonald's knows that, if a child choked on a part from the toy and suffered brain damage, McDonald's would be held liable for its fair share of the medical costs - despite the clear negligence of the parents - provided that it could have foreseen that this would happen.

With regard to meals served to children, and even meals like Happy Meals and Mighty Kids Meals intended solely for children, McDonald's provides no warnings whatsoever.

<sup>11</sup> Congress wisely denied just such immunity to the tobacco industry, even after several multi-million dollar verdicts. The only other instances of industry immunity - shielding gun makers from lawsuits for "harm caused by the criminal or unlawful misuse" of a firearm, limiting the liability of airlines if armed pilots accidentally shoot a crew member or passenger; and limiting the nuclear industry's liability in the event of a catastrophic accident - are all clearly distinguishable.

seemingly is rejecting them and is prepared to hold the industry liable in law suits.<sup>13</sup>

The industry and its spokesmen claim that all such law suits are frivolous, but industries do not need protection against law suits which are truly frivolous,<sup>14</sup> only those law suits which judges, juries, and appellate courts are likely to take seriously. In this regard note that the smoker law suits, the non-smoker law suits, and the law suits by the states against the tobacco industry, all were initially called frivolous.<sup>15</sup> But they have all proven their worth, and helped to make a significant dent in the public health problem of smoking.<sup>16</sup>

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<sup>13</sup> One recent survey shows that almost half of the public already blame fast food companies for contributing to the current epidemic of obesity, and another says that jurors are almost as likely to vote against defendants in fat suits as against defendants in tobacco suits. See: [http://banzhaf.net/obesitymediareleases#Jurors\\_Support\\_Fat\\_Suits](http://banzhaf.net/obesitymediareleases#Jurors_Support_Fat_Suits)

<sup>14</sup> “Frivolous” has been defined as “Unworthy of serious attention; trivial.” But these law suits and the threat of future suits are being taken very seriously by many major business and general interest publications (including one new publication, Obesity Policy Report, devoted primarily to this topic) <http://www.obesitypolicy.com/> The law suits are also being taken very seriously by industry and stock analysts. See generally <http://banzhaf.net/obesitylinks>

The industry itself has paid for full-page ads in national magazines attacking the suits, and has written Op-Ed pieces opposing them. But their very concern and attention to these legal actions clearly belies any suggestion that the industry regards them as merely frivolous.

<sup>15</sup> Indeed, one of the panelists today, Victor Schwartz, once appeared on television with the author and confidently predicted that no smoker law suit against a cigarette maker would even get to trial, much less produce a verdict for plaintiff.

Even the lawyers who represented smokers in such suits were reluctant to represent NONsmokers in suits against the tobacco industry, believing that such suits had little if any chance of success. But one husband-and-wife team has already won \$300 million in the first round of a class action nonsmoker law suit, and individual nonsmoking plaintiffs are beginning to win also.

Finally, even anti-tobacco lawyers were so sure that state law suits against the industry could not possibly succeed that most refused to take them on, and the few that did were called “crazy.” Today, of course, we call them multi-millionaires, since these law suits - likewise termed “frivolous” in their day - have now resulted in a settlement of over \$240 BILLION dollars.

As one reporter, after talking to many legal experts of all sides of the issue put it: “All the legal experts I talked to agreed on one thing: After tobacco overturned years of legal precedent, you can't say any lawsuit is impossible.” **Can We Sue Our Own Fat Asses Off?:** <http://salon.com/tech/feature/2002/05/24/fastfoodlaw/index.html>

<sup>16</sup> See, e.g., **Where the Public Good Prevailed, *The American Prospect*** [04/01].

Many articles and reports have suggested that more progress has been made regarding the

In this bill Congress assumes that it can pre-determine that in no set of facts involving food litigation should any company be held liable, even for its fair share of the resulting costs.<sup>17</sup> This is presumptuous as well as preposterous, since the bill covers many situations in which most would agree that there should be liability. It also departs from the 200-year old tradition of letting courts first decide new cases as they arise, and then stepping in to “correct” the process only if the results prove to be clearly contrary to the public interest.

This is especially egregious here because the bill unreasonably and unnecessarily interferes with the rights of states to have their courts decide these issues, at least initially, and is so broad that it seems to affect matters having no relationship to “interstate commerce” and therefore may be, as the U.S. Supreme Court has recently reminded us, beyond Congress’ ability to legislate.

For all of these and other reasons, it is respectfully suggested that it is premature - if not presumptuous and preposterous - for Congress at this time to conclude that the one weapon against the war on obesity which appears to be having an impact should be eliminated; that it can decide without waiting for state court trial and appellate judges to consider the myriad of factual situations, legal arguments, and still-undiscovered evidence which may be presented in these trials that no such plaintiffs should even have their day in court; and that an industry should be given unprecedented immunity from all liability without any showing of harm or even serious danger.

Instead, Congress should consider comprehensive legislation aimed at America’s epidemic of obesity [see next page], wait to see what the effect of the legislative remedies and of fat litigation may be, and then and only then even consider some form of limited immunity. Fortunately, this bill is so ill-considered that it contains several unintended loopholes.

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problem of smoking than any other major public health problem: e.g, abuse of alcohol, illicit drug use, teenage pregnancies, etc.. Clearly this is due in large part to the effective use of a wide variety of different kinds of legal actions - exactly what is being planned now with regard to obesity.

<sup>17</sup> It should be noted that plaintiffs in fat suits - like plaintiffs in tobacco suits - do not necessarily contend that they bear no responsibility, and/or that the defendant is solely responsible and should pay all of the costs. Instead, plaintiffs in the fat suits - like plaintiffs in the tobacco suits - simply argue that the defendants’ failure to clearly and conspicuously provide necessary information, or to provide appropriate warnings, etc., was at least in some part a cause of the resulting medical problem, and that the defendant therefore should bear its fair share of the costs.

Both the author and those involved in the movement to use legal action as a weapon against obesity have frequently stated that legislation is far preferable to litigation. Legislation can accomplish more, be applied fairly across the board, and affect many practices that litigation cannot reach. Here are only a few proposals which Congress may wish to consider before it abdicates its own responsibility to regulate, and simply grants the industry unnecessary blanket immunity:

**A.** Require that all fast food restaurants display information about the calories and fat in their menu items at the point of purchase when patrons are considering their choices while standing on line, not buried on a web site or on a hard-to find pamphlet or back wall. Several state bills to require this have been introduced, and Congressional action would avoid confusion due to lack of uniformity.

**B.** Require that all fast food restaurants provide appropriate warnings about the danger of eating fattening fast food too often. PepsiCo has promised to do this, and McDonald's is already doing it in France.

**C.** Require that all fast food restaurants provide more nutritious alternative menu choices for people who find it inconvenient to eat elsewhere and who want to avoid the many fattening foods which all too frequently are their only choices.

**D.** Require that all food items intended for young children - e.g., Mighty Kids Meals, Lunchables, etc.- provide information about fat and calorie content not only in terms of adult nutritional requirements but also in terms of the vastly lower requirements for young children so that parents can knowledgeably exercise the parental responsibility they are urged to.

Should the fast food restaurants do these things – either voluntarily or as a result of uniform legislation - it would appear that they would largely insulate themselves from potential liability. This is a far better approach than simply granting them unearned immunity.